IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

Union of India & Ors. **VS**. Umesh Kumar Malik.

D.B. CIVIL SPECIAL APPEAL NO.1033/1997
against the order dt.25.7.1997 passed in
S.B. Civil Writ Petition No.3756/91.

Date of judgment : 8th Dec., 2005

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE R.P. VYAS

REPORTABLE

Mr. V.K. Mathur for the petitioner.
Mr. Mukesh Vyas for the respondents.

BY THE COURT:- (Per Hon'ble Mr. Rajesh Balia, J.)

This appeal is directed against the judgment of learned Single Judge dated 25.7.1997. The writ petition filed by the respondent-petitioner was accepted by learned Single Judge by which Annex.5 dated 31st Jan., 1991, striking off the name of petitioner from Unit w.e.f. 31.01.1991 with immediate effect, and the show cause notice dated 11.1.1991 in pursuance of which termination order took place, were quashed.

The respondent-petitioner was working as a Sweeper

with the Boarder Security Force and was posted in 73 Battalion. He proceeded on sanctioned leave from 10.10.1990 to 29.10.1990. However, he did not report on duty after expiry of sanctioned leave. After show cause notice was issued, he applied for extension of leave on medical ground upto 30th January, 1991. As per the petitioner, he had come to the office on 31st January, 1991 after remaining absent from duty for the period including the period as alleged in the application for extension of leave but he was not taken on duty and was handed over the letter of dismissal from service on 31st Jan., 1991.

The learned Single Judge allowed the writ petition by holding that no enquiry was held nor any report has been put before the Commandant thus, the provisions of Rule 22 of the B.S.F. Rules has not been complied with. Learned Single Judge was of the opinion that proper opportunity of hearing should be given to the respondent-workman. Therefore, the show cause notice was set at naught. Consequently, the termination order was also set aside.

It is submitted by the appellant-non-petitioners that the petitioner did not report on duty after expiry of sanctioned leave on 29.10.1999. Vide Annex.R/1 dated 18.12.1990, he was asked to join his duty as he was being treated absent and vide another letter dated 11.1.1991 Annex.R/2 the petitioner was informed that because of absence without leave, the retention of the petitioner is

not desirable in service and, therefore, show cause notice was given that why his service may not be terminated. He was required to submit his reply by 25th Jan., 1991. However, no reply was submitted. His services were terminated vide Annex.5 dated 31.1.1991 and appeal against the same was also dismissed on 10th April, 1991. It was stated by the respondent that enquiry contemplated under Section 62 of the B.S.F. Act had been conducted after completing the enquiry in terms of Rule 22 of the B.S.F. Rules, the services of the petitioner were terminated.

Reliance was placed on Annexure R/2, the show cause notice, however, learned Single Judge opined that enquiry under Rule 22 was not held in the manner prescribed inasmuch as according to the learned Single Judge, no report has been put before the Commandant nor the Commandant has made any report in the letter of show cause notice Annex.R/2. It is submitted that to proceed under Sec.62, under which declaration from service or from duty is required to be made, for such declaration a court of enquiry must be held.

The learned Single Judge was further of the view that the case of the petitioner is that he actually started on 27.1.1991 for reporting on duty at Karanpur and had reached in Karanpur on 29.1.1991 and in any case had actually reported for duty on 30.1.1991 but was not allowed to join on that date, there seems to be some truth in the submission of the petitioner that he has not

received the show cause notice. Had he received show cause notice like Annex.R/2 even though Annex.R/2 is vague and not in accordance with the rules, his conduct would have been different.

The learned counsel for the appellant has pointed out that Section 62 of the B.S.F. Act is a procedure provided for declaring a person deserter from Security Force and then to suffer the consequence as a deserter. Desertion from B.S.F. tentamounts to an offence. On the other hand to face removal from service on alleged misconduct is governed by Rule 22. Under Rule 22 of the B.S.F. Rules only show cause notice is required to be given for proposed action on the prima facie satisfaction reached by the disciplinary authority about the misconduct and he can pass appropriate order of punishment, after considering the reply in defence, if any, submitted by the delinquent incumbent. No other procedure than giving a show cause notice against the proposed action on prima facie reaching satisfaction of the disciplinary authority about the misconduct of the delinquent incumbent is required to be followed.

During the course of hearing at earlier stage, the appellant was directed to keep the record of the proceedings which led to dismissal of respondent. This order was passed on 19.5.2005. On the next date of hearing when the record was produced learned counsel for the respondent-petitioner took some time to look into the records as some of the letters which were on

record were not within the knowledge of the learned counsel. The record was made available to the learned counsel for the respondent-petitioner for his perusal.

From perusal of the record brought before the Court, it is apparent that in the first representation made on 2nd April, 1991 soon after the order of dismissal was passed on 31st January, 1991 and was communicated to the incumbent no mention has been made of his alleged reporting on duty on 30th Jan., 1991 and the Commandant not allowing him to join the duty. This letter completely belies the story put forth by the respondent-petitioner about his bonafide in making an application for extension of sanctioned leave and his reporting on duty on expiry of period for which he wanted extension of his leave. Therefore, one of the major premise on which the conclusion of learned Single Judge was founded that the petitioner reported on duty in pursuance of his application for extension of leave on 30th January, 1991 is wholly non-existent and no such inference could have been drawn by the learned Single Judge in favour of the respondent in the absence of any such material on record.

We are also of the opinion that Section 62 and its interrelation with Rule 22 has been not properly appreciated.

Section 62 of the B.S.F. Act reads as under:-

> **62. Inquiry into absence without leave**.-(1) When any person subject to this Act has been absent from duty without due authority for a period of thirty days, a court of inquiry shall, as soon as practicable, be appointed by such authority and in such manner as may be prescribed; and such court shall, on oath or affirmation administered in the prescribed manner, inquire respecting the absence of the person, and the deficiency, if any, in the property of the Government entrusted to his care, or in any arms, ammunition, equipment, instruments, clothing or necessaries; and if satisfied of the fact of such absence without due authority or other sufficient cause, the court shall declare such absence and the period thereof and the said deficiency, if any, and the Commandant of the unit to which the person belongs shall make a record thereof in the prescribed manner.
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> (2) If the person declared absent does not afterwards surrender or is not apprehended, he shall for the purpose of this Act, be deemed to be a deserter."

A perusal of the aforesaid provision goes to show that Section 62 has no link with the disciplinary action that may be taken against a person for remaining willful absence from duty without authorised leave. Section 62 is a procedure to be followed by the B.S.F. Authorities before declaring any absentee as deserter from security force. Section 62 in no way concerns termination of services of any staff of B.S.F. for the alleged misconduct of remaining absent from duty unauthorizedly. In fact, absence without leave for a specified period may entail consequence on a declaration made under Section 62 to another declaration of incumbent being a deserter from the security force and against which he would become eligible. The deserter from the security force amounts to an offence for which different consequences may follow. However, remaining unauthorised absent from duty also

amounts to misconduct in service for which disciplinary action can be taken and appropriate punishment can be imposed looking to the gravity of the misconduct. For imposing punishment for any misconduct Rules 20, 21 and 22 prescribe the procedure while Rule 20 applies to the disciplinary proceedings in the case of officers. Rule 21 applies to termination of services of officers by the Central Government. Rule 22 applies to dismissal or removal of persons other than officials on account of misconduct. It is a case of the person who is not an officer of the security force. Reference to Rule 20 and 21 is, therefore, of little relevance. Rule 22 reads as under:-

> **Rule 22. Imposition of penalty**
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> (1) After going through the allegations against the person intended to be dismissed or removed, his defence, and the proceedings of enquiry if any, the Director General shall, if the case has been initiated by the Central Government, and, may, in other cases, take his recommendation to the Central Government and the Government may dismiss or remove such a person.
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> (2) If the Central Government considers that the allegations are proved but dismissal or removal would be too severe a punishment, it may order:
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> (i) the retirement of the officer; or
> (ii) imposition of the penalty of forfeiture of service for purpose of promotion or seniority; or
> (iii) may order the withholding of increments or any other punishment which would be sufficient to meet the ends of justice.
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> (3) The Director-General, an Inspector-General or a Deputy Inspector-General before dismissing or removing from the service a person subject to the Act shall comply as far as applicable, with the provisions of rule 20, 21 and sub-rule (2) of this rule;
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> Provided that a Deputy Inspector-General shall

not dismiss or remove a subordinate officer of the rank of Subedar (Inspector)."

Rule 22 leaves no room of doubt that termination by way of disciplinary action for alleged misconduct if accorded with the aforesaid procedure does not suffer from the vice of non-enquiry or defective enquiry.

It may further be noticed that the Security Force in itself enjoys different status and the Rules have been framed under legislative mandate and not under proviso to Article 309. The ordinary principle of natural justice have to give way to the statutory procedure prescribed for reaching to a particular decision. In such event, the statutory Rules are required to be followed for the purpose of reaching to a particular decision. The other Rules cannot be incorporated in the procedure as a mandate of law nor non-observation of the general principles of natural justice in the voice of statutory provisions automatically vitiates the mandate of fair enquiry unless the Rule itself can be held to be arbitrary and unreasonable. No challenge to the rule on such ground has been raised before us. Therefore, it must be taken that the procedure required to be followed for dismissal or removal of person other than the officer for the alleged misconduct as per Rule 22. Rule 22 which has been reproduced above clearly goes to indicate that the procedure prescribed under Sub-Rule (2) require that when after considering the reports on an Officer's misconduct, the competent

authority is satisfied that the trial of the Officer by a Security Force Court is inexpedient or impracticable, but is of the opinion, that further retention of the said officer in the service is undesirable, it shall inform him that he is satisfied with undesirable service and if required, he is called upon to submit in writing, his explanation and defence. The competent authority after considering this defence, if any, may dismiss or remove from service with or without pension. The competent authority, who can pass the order of dismissal or removal has been prescribed as per Section 11 and Rule 17. It is not the contention before us that the impugned order has not been passed by a competent authority. It is also not in dispute now before us that the competent authority did issue a show cause notice on finding that the incumbent has not reported on duty since expiry of his sanctioned leave w.e.f. 27.10.1990. Firstly, the petitioner was given opportunity to join duty, when he did not report, the show cause notice was issued why his service may not be terminated and called upon him to submit his reply by 25th January, 1991 vide notice dated 11th Jan, 1991, Annexure R/2. Admittedly this notice was not required to be issued.

In these circumstances, the conclusion reached by the learned Single Judge that the enquiry conducted on violation of Section 62 read with Rule 22 cannot be sustained. There being no defect in the enquiry and further dispute that he did not join his service after the expiry of sanctioned leave until the passing of the impugned order and after 27th Oct., 1990, he was absent without

any authorisation in his favour. The finding reached by the competent authority in that regard cannot be said to be perverse or not founded on any material so as to warrant interference with that finding.

Consequently, the petition must fail. The learned counsel for the respondent urged that the punishment of dismissal is grossly excessive in the circumstances of the case and therefore, the punishment awarded to the delinquent may be appropriately modified. We are of the opinion that in the circumstances, the person attached with the Security Force cannot remain away from the force for such a long period without authorisation. The dismissal order cannot be said to be so grossly excessive so as to warrant interference in exercise of extra-ordinary jurisdiction.

The appeal, therefore, allowed. The judgment under appeal is set aside. The writ petition is dismissed. No order as to costs.

[R.P. VYAS], J. [RAJESH BALIA], J.

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